

No. 13136.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MINORU HAMAMOTO,

Appellant,

vs.

DEAN ACHESON, as Secretary of State,

Appellee.

On Appeal From the United States District Court for the
Southern District of California.
Central Division

BRIEF FOR APPELLEE AND APPENDIX.

WALTER S. BINNS,

United States Attorney,

CLYDE C. DOWNING,

Assistant U. S. Attorney,

Chief of Civil Division,

ARLINE MARTIN,

Assistant U. S. Attorney,

312 North Spring Street,

Los Angeles 12, California,

Attorneys for Appellee.

FILED

APR 17 1952

PAUL P. O'BRIEN
CLERK

TOPICAL INDEX

| | PAGE |
|----------------------------|------|
| Jurisdiction | 1 |
| Statutes involved | 2 |
| Statement of the case..... | 3 |
| Summary of argument..... | 4 |
| Argument..... | 5 |

I.

| | |
|--|---|
| Constitutionality | 5 |
| A. Section 401 of the Nationality Act of 1940 is constitutional on its face..... | 5 |
| B. Section 401 of the Nationality Act of 1940 is constitutional as applied..... | 6 |
| 1. The burden was on the appellant to prove duress, and the evidence supports the finding and conclusion of the court that there was no duress..... | 6 |
| 2. It is not necessary to prove that appellant's real attachment was to a foreign state in order for the court to find his military service was voluntary..... | 7 |
| 3. Subjective knowledge of the consequence of expatriation which will result from voluntary service in the Japanese army is not a prerequisite to expatriation | 8 |

II.

| | |
|--|-----------|
| Duress | 8 |
| A. Appellant's service in the Japanese army was voluntary and not the result of duress, and the court did not err in so finding..... | 8 |
| 1. Appellee's theory of the case..... | 8 |
| 2. The facts | 9 |
| 3. The law | 10 |
| The Podea case | 12 |
| The Dos Reis case..... | 15 |
| The Gogal case | 16 |
| The conditions in Japan..... | 19 |
| Conclusion | 21 |
| Appendix A. Plaintiff's exhibits | App. p. 1 |

TABLE OF AUTHORITIES CITED

CASES

| | PAGE |
|--|-----------|
| Acheson v. Kuniyuki, 189 F. 2d 741..... | 17 |
| Bauer v. Clark, 161 F. 2d 397..... | 17 |
| Cantoni v. Acheson, 88 Fed. Supp. 576..... | 17 |
| Dos Reis ex rel. Camara v. Nicolls, 161 F. 2d 860..... | 6, 15 |
| Gogal, In re, 75 Fed. Supp. 265..... | 16 |
| Kuniyuki v. Acheson, 181 F. 2d 741..... | 5, 8 |
| Murata v. Acheson, 99 Fed. Supp. 591..... | 5 |
| Okimura v. Acheson, 99 Fed Supp. 587..... | 5, 6 |
| Podea v. Marshall, 83 Fed. Supp. 216..... | 7, 11, 12 |
| United States v. Savorgnan, 338 U. S. 491..... | 8, 17 |

MISCELLANEOUS

| | |
|--|---|
| Supreme Court Journal of Proceedings, 20 Law Week. 3167..... | 5 |
|--|---|

STATUTES

| | |
|---|------------|
| Nationality Act of 1940, Sec. 401..... | 3, 5, 6 |
| Nationality Act of 1940, Sec. 401(c) | 2, 3, 5, 6 |
| Nationality Act of 1940, Sec. 401(e) | 5, 21 |
| Nationality Act of 1940, Sec. 402 | 2, 6 |
| Nationality Act of 1940, Sec. 403(b)..... | 2 |
| Nationality Act of 1940, Sec. 503..... | 1 |
| United States Code, Title 8, Sec. 801(c)..... | 2 |
| United States Code, Title 8, Sec. 802..... | 2 |
| United States Code, Title 8, Sec. 803 | 2, 3 |
| United States Code, Title 8, Sec. 903..... | 1 |
| United States Code, Title 28, Sec. 1291..... | 2 |
| United States Code, Title 28, Sec. 1294(1)..... | 2 |

No. 13136.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MINORU HAMAMOTO,

Appellant,

vs.

DEAN ACHESON, as Secretary of State,

Appellee.

**On Appeal From the United States District Court for the
Southern District of California.
Central Division**

BRIEF FOR APPELLEE.

Jurisdiction.

The District Court has jurisdiction of the action under provisions of Section 503 of the Nationality Act of 1940 (8 U. S. C. 903) as alleged in Paragraph III of plaintiff's Complaint [C. T. 2], the necessary factual allegations of "denial of a right or privilege as a national of the United States * * * on the ground that he is not a national * * *" as required by Section 903 being alleged in Paragraphs V and VI of plaintiff's Complaint [C. T. 3]. The denial having been made by the Secretary of State, the defendant, Dean Acheson, as head of that Department, is the necessary and proper defendant as required by said Section 903, *supra*.

This Court has jurisdiction of this appeal under the provisions of 28 U. S. C. 1291 and 1294(1), there being no dispute that the judgment of the District Court was a final judgment.

Statutes Involved.

The denial of citizenship by defendant-appellee was based on the provisions of Sections 401(c), 402 and 403(b) of the Nationality Act of 1940 (8 U. S. C. 801(c), 802 and 803) as follows:

“§801 General means of losing United States Nationality.

A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; * * *.

“§802 Presumption of expatriation.

A national of the United States who was born in the United States * * * shall be presumed to have expatriated himself *under subsection (c) or (d) of Section 801, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state* * * * and such presumption shall exist until overcome whether or not the individual has returned to the

United States. Such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States or to an immigration officer of the United States under such rules and regulations as the Department of State and the Department of Justice jointly prescribe. * * *.

“§803 *Restrictions on expatriation; residence in United States; age.*

(b) No national under 18 years of age can expatriate himself under subsections (b) to (g) of Section 801.” (Emphasis supplied.)

Statement of the Case.

There are two principal questions presented by appellant's brief in this action:

1. Does the evidence support the Findings of Fact [C. T. 13] and Judgment [C. T. 18] of the District Court that appellant's service in the Japanese army was voluntary and not the result of duress and that plaintiff thereby lost his United States citizenship pursuant to the provisions of Section 401(c) of the Nationality Act of 1940 (*supra*)?

The manner in which this question is raised is by appellant's specification of errors 1, 2 and 3 (App. Br. 7).

2. Is Section 401 of the Nationality Act constitutional on its face and was the application thereof to this plaintiff constitutional?

This question was raised by appellant's motion for a new trial [C. T. 12] and in appellant's specification of error No. 3 (App. Br. 7).

SUMMARY OF ARGUMENT.

I.

Constitutionality.

A. SECTION 401 OF THE NATIONALITY ACT OF 1940 IS CONSTITUTIONAL ON ITS FACE.

B. SECTION 401 OF THE NATIONALITY ACT OF 1940 IS CONSTITUTIONAL AS APPLIED.

1. The Burden Is on the Appellant to Prove Duress, and the Evidence Supports the Findings and Conclusions of the Court That There Was No Duress.

2. It Is Not Necessary to Prove That Appellant's Real Attachment Was to a Foreign State in Order for the Court to Find His Military Service Was Voluntary.

3. Subjective Knowledge of the Consequence of Expatriation Which Will Result From Voluntary Service in the Japanese Army Is Not a Prerequisite to Expatriation.

II.

Duress.

A. APPELLANT'S SERVICE IN THE JAPANESE ARMY WAS VOLUNTARY AND NOT THE RESULT OF DURESS, AND THE COURT DID NOT ERR IN SO FINDING.

1. Appellee's Theory of the Case.
2. The Facts.
3. The Law.

ARGUMENT.

I.

CONSTITUTIONALITY.

A. Section 401 of the Nationality Act of 1940 Is Constitutional on Its Face.

Appellant has pointed out (App. Br. 19) that the District Court in Hawaii in the cases of *Okimura v. Acheson*, 99 F. Supp. 587, and *Murata v. Acheson*, 99 F. Supp. 591, held Sections 401(c) and (e) of the Nationality Act to be unconstitutional, and further noted that the Supreme Court did not pass on the constitutional issue but vacated the judgment and remanded the case to the Trial Court, for specific findings as to the circumstances attending appellant's services in the Japanese army and the reasonable inferences to be drawn therefrom (Supreme Court, Journal of Proceedings, 20 Law Week 3167).

However, it is to be noted that the question of constitutionality of Section 401(e) is being raised in the case of *Kuniyuki v. Acheson*, in which a petition for certiorari was filed December 24, 1951, by Messrs. Wirin & Okrand, attorneys for plaintiff in the instant case. The opinion of this Court in the *Kuniyuki* case is reported at 181 F. 2d 741, wherein this Court reversed the judgment of the District Court for plaintiff and held that the evidence does not support the Trial Court's finding that plaintiff voted involuntarily and that the fact that plaintiff did not intend to lose her nationality and did not know that she would lose it if she voted in such elections is immaterial. It would appear that this Court finds constitutional the various provisions in Section 401 of the Nationality Act. In the case of *Dos Reis ex rel. Camara*

v. Nicolls, 161 F. 2d 860, the Supreme Court did not find the provisions of the Nationality Act unconstitutional.

When the question of constitutionality was argued before the District Court in this case on the motion for new trial, the District Court pointed out that Congress can pass an act which is constitutional which is based on the premise that you can draw an inference from the doing of certain acts of an intent to expatriate. It is reasonable to say that the various acts of expatriation listed in Section 401 of the Nationality Act logically give rise to an inference of such an intent to expatriate, in the absence of evidence to the contrary. The argument of the District Court in the *Okimura* case, that if the acts outlined in Section 401 are constitutional, it would also be constitutional for Congress to declare that owning a gun or attending a military parade would expatriate, falls for the reason that there is no logical inference of such intent from such acts.

B. Section 401 of the Nationality Act of 1940 Is Constitutional as Applied.

- 1. The Burden Was on the Appellant to Prove Duress, and the Evidence Supports the Finding and Conclusion of the Court That There Was No Duress.**

The Government's burden of proof under the Nationality Act was sustained when plaintiff admitted service in the Japanese army, as alleged in plaintiff's Complaint [C. T. 2], the plaintiff then having Japanese nationality as required by Section 401(c) and having resided in Japan for more than six months [R. T. 12 and 66] and the presumption of Section 402 of the Nationality Act having come into play.

The burden of going forward with the evidence was then upon plaintiff, to prove that such military service was the result of duress. Plaintiff recognized this burden by the allegations in Paragraph V of the Complaint that his "service in the army * * * was the result of coercion and was not the plaintiff's free and voluntary act." This allegation was denied in defendant's Answer [C. T. 5].

See also, on burden of proof, *Podea v. Marshall*, 83 F. Supp. 216.

2. It Is Not Necessary to Prove That Appellant's Real Attachment Was to a Foreign State in Order for the Court to Find His Military Service Was Voluntary.

As discussed under Part II of this Brief under "Duress," the appellant has sought to break down into various defenses, certain bits of evidence which were offered in the various cases on the issue of duress, such as "attachment to a foreign state," "authentic abandonment of his own nationality," "offering his all in support of a foreign state," "free and intelligent choice." Regardless of the various phrases used by the Courts in the decisions or the variations of the evidence in each case, there is really only one issue tendered in these cases, and that is whether or not the expatriating act was voluntarily done or whether it was the result of duress. In any event, there is evidence in the record from which the Court could infer, as it did, that appellant's attachment was to Japan and that he returned to Japan with the intention of performing his duty of military service.

3. Subjective Knowledge of the Consequence of Expatriation Which Will Result From Voluntary Service in the Japanese Army Is Not a Prerequisite to Expatriation.

In *United States v. Savorgnan*, 338 U. S. 491, the Supreme Court held that the test of volition is "objective." See also *Kuniyuki v. Acheson*, 189 F. 2d 741, in which the Court in this Circuit held to the same effect.

II.
DURESS.

A. Appellant's Service in the Japanese Army Was Voluntary and Not the Result of Duress, and the Court Did Not Err in so Finding.

1. Appellee's Theory of the Case.

Because appellant's statement of the case and argument under appellant's Point II and Specifications of Error Nos. I and III essentially involve the question of the sufficiency of the evidence to sustain the finding of voluntary action by the Court, we here briefly summarize the facts as shown by the evidence.

It is appellee's theory of the case that where a person with full knowledge of a peril voluntarily places himself in a position of peril, when the peril thereafter actually occurs, the Court may draw an inference from such facts that such person did not intend or desire to avoid the peril and his actions were not the result of duress. In other words, the evidence shows that plaintiff with full knowledge of his eligibility for conscription in the Japanese Army, voluntarily returned to Japan at a time when he was eligible for conscription and remained there, knowing that he was subject to the peril of conscription, and as a result he was conscripted. The facts as revealed in the transcript of record, volume II, are as follows:

2. The Facts.

The plaintiff was born at Gardena, California, on December 17, 1917, of parents who were born in Japan [R. T. 6]. Appellant was in Japan three times, the first time being during the years 1924 to 1935 [R. T. 7], during which time, at the age of 16 to 18 years, he went to Japanese schools and received some military training [R. T. 68]. Japan has had a universal military conscription system for many years [Appellant's Ex. 13]. Appellant returned to the United States in 1935 when he was 18 years of age.

Appellant went to Japan for the second time on April 13, 1938 at the age of 21 [R. T. 10]. He knew at that time he was a dual citizen [R. T. 70]—that is a Japanese citizen as well as an American citizen. While in Japan, at this time, and about May of 1938, appellant had a conversation with the man in charge of the draft for Japanese military duty in Esumi, the town where appellant lived, regarding the physical examination for the Japanese Army [R. T. 11], which all males were required to take under the Japanese conscription system after reaching their twentieth birthday [App. Ex. 13]. Appellant then thought he was eligible for conscription in the Japanese Army [R. T. 42], but did not receive a notice to report for physical examination at that time [R. T. 47].

In September, 1938, appellant returned to the United States. He visited the United States Consul at Kobe prior to returning to the United States [R. T. 51] and his return to the United States was not for the purpose of avoiding conscription in the Japanese Army [R. T. 52]. In May of 1939, in the United States, appellant had an operation and his appendix was removed [R. T. 13]. In

January, 1940, eight months later, appellant returned to Japan for the third time [R. T. 12, 66], and within a week reported his arrival in Japan to the Village Office and was told that if he stayed in Japan more than 90 days, he was subject to Japanese military duty [R. T. 49].

In the spring of 1940, appellant received a notice to report in July for a physical examination for the Japanese Army and also had a conversation with the draft man at Esumi [R. T. 14, 48]. He did not go to the United States Consul at Kobe or Osaka at this time [R. T. 55]. He did not have a return ticket to the United States and he did not try to get one at this time. He did not do anything to avoid taking the physical examination in July, 1940 [R. T. 57], and after taking the examination in July 1940, and up until July, 1941, when he entered the Japanese Army, he never discussed with anyone the question of his being inducted into the Japanese Army [R. T. 64].

On July 5, 1940, appellant reported and took the physical examination pursuant to the notice he had received [R. T. 17, 66], and 10 days later, he went to Kobe to talk to a travel agent [R. T. 20].

On July 5, 1941, appellant entered the Japanese Army [R. T. 22, 66], and served therein until September of 1941, after which he did not try to return to the United States [R. T. 64].

3. The Law.

It can be seen from these facts that in this case, unlike most of the other military service cases which have been tried in the District Court, and which appellant has cited in his brief, the appellant served in the Japanese Army prior to the Japanese attack on Pearl Harbor December

7, 1941, and at a time when Japan was not at war with the United States.

The opinion of the District Court, 98 F. Supp. 904 [C. T. 7] indicates that the Court followed the views expressed in the *Podea v. Marshall* case, 83 F. Supp. 216, 179 F. 2d 306, that an inference could be drawn that the service in the Japanese Army was voluntary from the facts that the appellant, with full knowledge of his eligibility for conscription, placed himself in a position to be conscripted and was conscripted. The District Court in the instant case said at page 905 [C. T. 9]:

“The plaintiff knew Japan and knew the conscription laws of Japan. He attended school there. He discussed the matter of his citizenship with the ‘village master’ before his return to the United States in 1935. Again, on the occasion of his visit to Japan in 1938 he discussed the matter of conscription with an ‘official in charge of the draft.’ He states that he asked how he could remove his name from the ‘Family History’ and was told that it could not be done because he was the ‘eldest son.’ He returned to Japan in 1940 on a one way steamship ticket, took his physical examination for the army within three months of his arrival, and remained in Japan for a period of sixteen months between the time of his medical examination and his induction into the army. After his discharge from the army because of ‘kidney trouble,’ he remained in Japan.

Certainly it is not an unreasonable inference to conclude that the plaintiff went to Japan in 1940 for the specific purpose of fulfilling his duty as a Japanese citizen and eldest son, by serving in the army of Japan.

In this type of case there is but one witness, the plaintiff. The defendant has a record of the plaintiff's service in the Japanese army, but there are no witnesses available to refute his statements with respect to the voluntary character of his acts.

* * * * *

The court is not bound to accept testimony even when unimpeached or not directly contradicted, against presumptions or contrary reasonable inferences from other facts in evidence. Such presumptions and inferences create a conflict for the determination of the trier of facts. In passing on the credibility of witnesses and the weight to be given their testimony, the trier of fact may consider their interest in the result of the case, their motives, the manner in which they testify, and the contradictions appearing in the evidence. Applying this test in the instant case leads the court to the conclusion that the plaintiff has failed to overcome the presumption that he was voluntarily expatriated by serving in the Japanese army."

THE PODEA CASE.

In the case of *Poddea v. Marshall*, 83 F. Supp. 216, the Court held that the plaintiff did not sustain the burden of proof that his service in the Roumanian Army was not voluntary, despite the admitted fact that plaintiff was conscripted into the Roumanian Army. The Court's decision was based on the fact that the plaintiff had voluntarily placed himself in a position of peril by returning to Roumania at or about the time he was subject to be drafted into the Roumanian Army, and that having placed himself in a position of peril he could not now use such peril as a cloak.

The facts and the reasoning of a Court are contained in excerpts from the decision as follows:

“Plaintiff was born in the City of Youngstown, Ohio, on September 21, 1912. His parents were nationals of Austria-Hungary.

* * * * *

“Plaintiff was domiciled in Roumania continuously from 1921 to 1942, except for a visit he made to the United States in 1939, * * *.

“In October, 1936, plaintiff was inducted into the army, and, together with his entire class of inductees, took an oath of allegiance to Roumania.

* * * * *

“It is worthy of note at this point that plaintiff admits that during his visit to the United States he knew that he was a Reserve Officer in the Roumanian Army, that war in Europe was imminent, and that he would be called up for service in the event of war. Yet, he preferred to return to Roumania.

“It would appear, therefore, that plaintiff was obliged to act affirmatively in order to retain his American citizenship on and after September 21, 1933. The most persuasive evidence of such election would have been his immediate return to the United States. United States *ex rel.* Scimeca v. Husband, *supra*; Dos Reis *ex rel.* Camara v. Nicolls, 1 Cir., 161 F. 2d 860. Hence, conversely, the law will presume that his continuing domicile constituted an election by him to choose Roumanian nationality unless it can be satisfactorily shown that such continued domicile was under duress, fear of imprisonment or such other circumstances as may have rendered the same involuntary.

* * * * *

“Having failed to act promptly after attaining his majority, the burden was his to satisfactorily explain or excuse his dilatory conduct between September 21, 1933, and the time of his return in 1942.

* * * * *

“In my opinion he failed to sustain his burden by a fair preponderance of the evidence. Neither his education nor military service necessitated his remaining any longer in Roumania, yet, not only did he fail to perfect his rights of American citizenship, but in 1939, he committed a final, fatal act which cut off any future right to election. On a visit to the United States in 1939 *he placed a commercial assignment and the liquidation of his personal affairs in Roumania above the choice to establish his American citizenship*, if it could be said that such choice still survived. The legal effect of his return to Roumania at this time is overwhelmingly against him.

* * * * *

“However, he alleges that such military service was involuntary in that it was induced by compulsion and fear of imprisonment.

“The government, on the other hand, contends that while the plaintiff did not volunteer or serve willingly, yet, having failed to take steps to avoid such service in each instance, he cannot now be heard to say that such service was involuntary. In other words, it claims that plaintiff, having voluntarily placed himself in a position of peril, cannot now use such peril as a cloak.

* * * * *

“I am inclined to agree with the government’s contention that the plaintiff’s actions and conduct, while

they may not prove that plaintiff's service was in fact voluntary, at least cast great doubt on his claim that such service was involuntary.

"The burden is on the plaintiff, and he has failed to sustain it. * * *"

THE DOS REIS CASE.

There is no dispute that the case of *In re Dos Reis ex rel. Camara v. Nicolls*, 161 F. 2d 860, holds that the act of expatriation must be voluntarily done, but it does *not* hold that the mere fact of conscription into an army under a system of universal conscription is duress. As the District Court said during argument [the Reporter's Transcript does not include it], conscription is not involuntary, it is a system, men believe that is the way to raise an army.

The statements in the *Dos Reis* case regarding "attachment to a foreign government," "giving his all" are not to be considered as separate doctrines laid down by the Court as defenses to expatriation, but are all bits of evidence which the Court considered in determining whether or not duress existed. The facts which constitute duress or prove volition are different in every case and just because in one case the Court found volition based on the fact of "attachment to a foreign government" does not mean that it must be shown in every case that there was such an attachment before the Court can find that the action was voluntary.

THE GOGAL CASE.

There is no dispute that in the case of *In re Gogal*, 75 F. Supp. 265, the Court also follows the view that the action must be voluntary, in other words, that duress is a defense. But that Court did *not* say that the mere fact of conscription proves duress. The Court says at page 271 (as quoted in appellant's brief, pp. 23 and 24), "Where such a person is drafted *over his protest* into foreign military service" loss of nationality is not caused (emphasis supplied). But where was there any protest in the instant case? Protest or some evidence indicating opposition to entering into the military service or intent and desire not to serve must be manifested.

The Court properly inferred, from appellant's voluntary return to Japan and his continuing stay there in time of peace for over 18 months until he was inducted, as he well knew would be the case, that appellant had no state of mind of protest and made no attempt to avoid such service. The witness was before the Court, and as the Court said in its opinion at page 906 (*supra*):

"The Court is not bound to accept testimony, even when unimpeached or not directly contradicted, against presumptions or contrary reasonable inferences from other facts of evidence."

The Court's inference from the facts was proper and supports the findings made.

The other cases of military service and voting which have been tried in the District Courts, all cited by appellant, are of no assistance in determining whether or not duress exists in this case. The facts of each case are different. Most of the other cases represent situations where the entry into the Japanese Army occurred after the outbreak of war with the United States and as late

as 1943-45, and the fact that duress was found to exist in some other case does not prove that it was error for the Court to find the action was voluntary in this case.

In *Savorgnan v. United States*, 338 U. S. 491, the Supreme Court held that the test as to the voluntary or involuntary nature of the expatriating act is "objective."

In *Acheson v. Kuniyuki*, 189 F. 2d 741, 897, this Court reversed the District Court's judgment for the plaintiff and held that the evidence did not support the Trial Court's finding that plaintiff voted involuntarily and that the fact that plaintiff did not *intend* to lose her nationality and did not *know* that she would lose it if she voted in such elections is immaterial.

In *Bauer v. Clark*, 161 F. 2d 397, the Court said:

"He says he was afraid, but there is such a thing as a loyal American citizen being afraid to do his duty and yet doing it, and his statement carries to me no conviction whatsoever."

In the case of *Cantoni v. Acheson*, 88 F. Supp. 576, the Court said:

"Plaintiff contends that at the time he served in the Italian army and took the oath of allegiance to Italy and also at the time he voted in the Italian election, he acted without knowledge that he was entitled to American citizenship. Hence he claims that such acts were not freely or intelligently done. Full and intelligence choice, it is asserted, is essential to effectuate renunciation. Plaintiff now says, not that he was not cognizant at all times of the place of his birth, but that he was not aware of the legal impact of the place of his birth upon his citizenship until the year 1947, when he was almost 31 years of age.

"Having heard his testimony and the other evidence, I am not willing to accept this unilateral ex-

pression as true. From the time he was a boy starting to school he knew that he was born in the United States. His day by day activities, as well as his service in the Italian army, his oath of allegiance to Italy, his voting in the Italian election, were performed with continuing awareness of the place of his birth. All of the circumstances pertaining to his life in Italy, plus my appraisal of him as a witness, are convincing that his statement of unawareness of the consequences of his American birth is unacceptable.

“But even assuming the verity of his alleged belief locked in the secret chamber of his mind until he was past thirty years of age, it does not constitute evidence legally sufficient to sustain his contention that he did not freely and intelligently perform the acts that, under the law, constitute renunciation of American citizenship.

* * * * *

“There is no creditable evidence in this case that the acts of renunciation were not voluntarily and freely done. There was testimony that plaintiff performed military service because he thought he had to and that he voted because he feared some governmental sanctions would otherwise be imposed. But that does not amount to an involuntary or forced act in the sense that he was compelled to perform such acts in spite of an ‘intensity of purpose to retain his American nationality’ *Dos Reis v. Nicolls, supra*, note 3. Any claimed reluctance in the performance of these acts was no more than may have conditioned the minds of many other Italians at the time. The facts do not disclose the kind of duress or involuntariness present in *Dos Reis v. Nicolls, supra*, note 3; *Schioler v. U. S.*, 75 F. Supp. 353 (N. D. Ill. 1948) or *In re Gogal*, 75 F. Supp. 268 (W. D. Penn. 1947).”

THE CONDITIONS IN JAPAN.

The transcript of record, Vol. II, contains the evidence at the trial of the action up to the time the examination of the plaintiff was completed and Exhibit 5 was admitted in evidence. Apparently through inadvertence, the remainder of the trial was not transcribed by the reporter, although the full reporter's transcript was designated by plaintiff as a part of the record. Exhibits 6 to 15 were offered during the remainder of the trial and for the convenience of the Court there is attached as Appendix A to this Brief a list of plaintiff's exhibits. No exhibits were offered by defendant. It will be noted that Exhibits 7 to 12 were admitted in evidence only for the purpose of aiding the Court in taking judicial notice. The Court stated the matters of which he was taking judicial notice (also not transcribed), and our notes indicate his statements to be as follows:

"The Court takes judicial notice that during the years 1940 and 1941 Japan was ruled by a military government, and personal loyalty and service to the emperor and to the state of which he was the head, was a religious and ethical duty as much as it was a governmental principle.

"During that period, loyalty to superiors and filial piety were regarded as unquestionable attributes of the moral man and good subject and in this everyone was to recognize as absolute his individual responsibility to guard and maintain the throne. The eulogy of war was combined with devotion to the emperor. Every subject of Japan was expected by the government to give up their life if necessary for the sake of the emperor. Japan had conscription laws at that time."

The parties hereto are attempting to get the remainder of the transcript above referred to typed and filed in the

Court of Appeals, but it is not known at this time whether or not this can be done because one of the reporters in the case is now in Honolulu.

The Court's attention is directed to Plaintiff's Exhibit 13 in evidence, being the deposition of Hidemitsu Matsuki, a Japanese official in the Japanese conscription system who testified as to the manner of the operation of that system.

Appellant's Brief, page 32, lays great stress on fear of appellant as to what would happen to him if he refused to enter the army when conscripted. The choice here was not limited to entry in the army or punishment for failure, but appellant had the alternative of returning to the country of his birth, the United States, and he failed to do so despite the fact that his physical examination occurred over a year prior to Pearl Harbor.

Apparently the District Court did not believe his testimony that he was afraid. On cross-examination [R. T. 59, 60], appellant admitted he never knew of anyone who had been executed, that he knew that the law provided jail as a penalty [R. T. 60], and the Deposition of Matsuki [App. Ex. 13] corroborates this. If appellant believed there was such a danger, he must have believed it before he returned to Japan in 1940 and exposed himself to the peril, and he thereby rejected his choice of avoiding the peril and we think that the Court was entitled to infer either that he did not believe the consequences he claims or that if he did have such a belief, he intended all along to serve voluntarily if conscripted. Otherwise why would he expose himself to a known peril?

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court that plaintiff was expatriated by reason of entry and service in the army of Japan pursuant to the provisions of Section 401(e) of the Nationality Act of 1940 should be affirmed.

Respectfully submitted,

WALTER S. BINNS,

United States Attorney,

CLYDE C. DOWNING,

Assistant U. S. Attorney,

Chief of Civil Division,

ARLINE MARTIN,

Assistant U. S. Attorney,

Attorneys for Appellee.

